No. 83-997

In the Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC., PETITIONER

v.

HAROLD H. THURSTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DAVID L. SLATE
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTIONS PRESENTED

1. Whether petitioner violated the Age Discrimination in Employment Act by involuntarily retiring airline pilots at age 60, when they are disqualified from serving as pilots, because it refused to allow them to transfer to other jobs after age 60 although all younger, similarly-situated pilots were allowed to do so.

2. Whether petitioner's violation of the Age Discrimination in Emplovment Act was willful.

3. Whether unions are liable for back pay under the Age Discrimination in Employment Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Page

Cases—Continued:

Statutes and regulation:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-997

TRANS WORLD AIRLINES, INC., PETITIONER

v.

HAROLD H. THURSTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 713 F.2d 940. The opinion of the district court (Pet. App. A44-A61) is reported at 547 F.Supp. 1221.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1983, and rehearing was denied on November 10, 1983 (Pet. App. A42). The petition for a writ of certiorari was filed on December 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This is a suit by three former pilots of Trans World Airlines, Inc. (TWA), and the Equal Employment Opportunity Commission as plaintiff-intervenor, charging that the airline violated the Age Discrimination in Employment

Act of 1967 (ADEA), 29 U.S.C. (& Supp. V) 621 *et seq.*, by refusing transfers to, and retiring, captains and co-pilots when they reached age 60. The pilots bargaining representative, the Air Line Pilots Association International (ALPA), was named as co-defendant.

TWA employs approximately 3000 crew members in four cockpit positions. The captain and the co-pilot (or first officer), who assists him, fly the plane. Pet. App. A6. The flight engineer monitors the mechanical, electrical, and electronic functioning of the aircraft. On certain long-distance flights, there is a fourth crew member, an International Relief Officer (IRO), who acts as third in command and who, inter alia, performs co-pilot and flight engineer duties. Pet. App. A5-A6.

The Federal Aviation Administration prohibits persons from serving as "pilots" on commercial aircraft beyond age 60 (14 C.F.R. 121.383(c)). Captains, co-pilots, and IROs are considered "pilots" subject to this restriction, but flight engineers are not (Pet. App. A7).

Historically, under the retirement plan negotiated between TWA and ALPA, all crew members were retired at age 60. Pet. App. A8. The company reassessed that policy after passage of the 1978 Amendments to the ADEA which, inter alia, amended the Act to prohibit employees' involuntary retirement on the basis of age before the age of 70. Pub. L. No. 95-256, § 4(f)(2), 29 U.S.C. (Supp. V) 623(f)(2). For several months after the April 6, 1978, effective date of the amendments, TWA continued to require all crew members to retire at age 60. On July 19, 1978 (in a letter to ALPA from TWA's Senior Vice President for Administration, David Crombie), the company announced that it was legally obligated to employ all pilots as flight engineers beyond age 60 and to offer to reinstate all pilots mandatorily retired after April 6, 1978, as flight engineers. The text

of the letter made clear that the recall or continued employment of captains and co-pilots would not depend on the existence of flight engineer vacancies. C.A. App. 426-427.

On August 10, 1978, by direction of J. Edward Frankum, Vice President of Flight Operations (C.A. App. 1006-1009), TWA, issued a bulletin to its personnel stating that "any cockpit crew member who is in flight engineer status at age 60" may not be compelled to retire (Pet. App. A9).[1] TWA accordingly offered to reinstate persons who were retired between April 6 and August 10, 1978, while holding the position of flight engineer or IRO. No offer was made to similarly situated captains or co-pilots (*ibid.*).[2]

Pursuant to the bulletin, TWA allows flight engineers and IROs to continue employment after their 60th birthdays as flight engineers unless they notify the company that they wish to retire. A TWA captain or co-pilot is mandatorily retired on his 60th birthday, however, unless he has bid on and been awarded a flight engineer vacancy with an

---

[1]Frankum opposed the employment of pilots beyond age 60, including flight engineers, and disagreed with the position taken in Crombie's July 19 letter (C.A. App. 828-836, 1000-1005, 1022). Frankum stated that when Crombie was hospitalized shortly after July 19, "I, in effect, disavowed [that] letter and we proceeded from there" (C.A. App. 1005A).

[2]On the day TWA issued its bulletin, ALPA filed suit against the company alleging that its revised policy was a unilateral change in the pilots' rates of pay, rules, or working conditions, in violation of Section 6 of the Railway Labor Act, 45 U.S.C. 156. ALPA also sought a declaratory judgment that TWA's policy was not required by the ADEA amendments because a maximum age of 60 constituted a bona fide occupational qualification for flight engineers under Section 4(f)(1) of the Act, and because the ADEA amendments were not effective until the expiration of the then existing collective bargaining agreement or January 1, 1980, whichever occurred first. Pet. App. A4-A5. ALPA's action was consolidated in the district and appellate courts with this action. ALPA lost in both courts and has not sought further review here.

effective date before his 60th birthday. *Ibid.*[3] TWA refuses to honor a bid for vacancies effective after the officer's 60th birthday on the ground that "[bids] can only be awarded to somebody on the seniority list and at age 60 a man goes off the seniority list" (C.A. App. 930, 974). The only officers who go "off the seniority list" at age 60, however, are captains and co-pilots because, according to TWA, they are required to be retired on that date under the FAA regulation.

The TWA-ALPA collective bargaining agreement (Working Agreement) does not deal specifically with the situation of captains and co-pilots barred from continuing in these positions by the FAA regulation.[4] In contrast, the Working Agreement does provide that pilots who are precluded from retaining their present positions for non-age related reasons remain employed and may exercise their seniority to secure alternative assignments. For example, captains and co-pilots unable to retain the FAA's first-class medical certificate but who are still medically qualified to become flight engineers may automatically "displace" or "bump" a less senior flight engineeer, without awaiting a flight engineer vacancy. Pet. App. A10. If the captain or co-pilot lacks

---

[3]In addition, since January 1980, TWA has required successful captain downbidders to "fulfill their bids in a timely fashion" Pet. App. A11. The result is that most downbidding captains must train for and assume flight engineer positions before age 60, with a concomitant loss in pay and responsibility. Furthermore, TWA previously had placed a successful downbidder on off-duty-without-pay status after his 60th birthday if he had not then passed the written examination prepared by the FAA as a prerequisite for pilot entry into flight engineer training. Since January 1980, however, TWA has permanently cancelled the bid of any captain who cannot prove that he has passed the flight engineer examination when reporting for training. Pet. App. A11-A12.

[4]Section 17 of the Working Agreement, entitled "Seniority", simply provides that "[a]ny pilot whose services with the company are permanently severed shall forfeit his seniority rights" (C.A. App. 250, 294 (Section 17(A)(6)).

sufficient seniority to displace, he is not discharged; rather, he is entitled to go on unpaid medical leave for up to five years (*ibid.*). Similarly, the Working Agreement provides that a pilot whose position is eliminated at his domicile due to reduced manpower needs may use his seniority to displace the least senior pilot in any status at his current or last former domicile, or in his current status anywhere in TWA's system. *Id.* at A11. Like his medically disabled counterpart, the jobless pilot who lacks sufficient seniority to displace is not discharged. Rather, he is placed in furlough status, which may extend for a period of up to ten years, during which time he continues to accrue seniority for purposes of a recall (*ibid.*). The Working Agreement also provides that a pilot who fails training to upgrade to captain or co-pilot, though permanently disqualified from holding those positions, is not discharged. He is instead assigned to permanent flight engineer status at his permanent domicile, whether or not a flight engineer vacancy there exists (*ibid.*). In the same vein, TWA has permanently downgraded pilots to a lower position for which they are qualified, as a disciplinary measure in response to demonstrated incompetence, without requiring the pilot to bid for a vacancy (*ibid.*). This practice, for which there is apparently no contractual provision, routinely occurs (*ibid.*).

2. In November 1978, respondents Harold Thurston and Christopher Clark filed a class action complaint in the United States District Court for the Northern District of Illinois, alleging that the refusal of TWA and ALPA to permit class members to transfer from captain to flight engineer positions on their 60th birthdays violated the ADEA. On April 19, 1979, C.A. Parkhill was joined as a party plaintiff, and on August 14, 1979, the case was transferred to the United States District Court for the Southern District of New York (C.A. App. 2, 4, 7). On August 25, 1980, EEOC's motion to intervene as a party plaintiff was granted (C.A. App. 9).

3. With the undisputed evidence summarized above before it, the district court ruled that TWA was entitled to judgment as a matter of law. The court held that the pilots and co-pilots who had been retired under TWA's policy failed to establish a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), because none could show that a flight engineer vacancy existed "at the time [he] applied and [was] eligible for the job" (Pet. App. A54-A57). The court further ruled that the evidence in its entirety did not established a prima facie violation of the ADEA (*id.* at A57-A59). It reasoned that "any denial of Flight Engineer status to pilots resulted from the neutral application of [a] bona fide seniority system and not by discriminatory treatment on the basis of age" (*id.* at A60).

4. The court of appeals reversed with directions to enter summary judgment in favor of respondents. The court held that respondents established a prima facie case of discrimination through direct evidence of disparate treatment, *i.e.*, that "TWA grants the downgrading requests of all pilots with sufficient seniority except those of captains and first officers who reached age 60" (Pet. App. A22-A24). The court noted that petitioner had not offered a legitimate, nondiscriminatory reason for its policy (*id.* at A31 n. 18), and further held that petitioner's actions were indefensible under either the "bona fide occupational qualification" or the "bona fide seniority system" exception to the ADEA, 29 U.S.C. 623(f)(1) and (2) (*id.* at A25-A29).

On the issue of relief, the court determined that liquidated damages were to be awarded against TWA pursuant to Section 7(b) of the ADEA, 29 U.S.C. 626(b), because its violation was willful (Pet. App. A33-A34). Citing *Goodman* v. *Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981) and *Wehr* v. *Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980), the court held that where, as here, an employer intentionally treats older workers less favorably because of their age, its

violation is willful if it "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA"(Pet. App. A33). The court concluded that the company's "attempt to escape full compliance [with the 1978 ADEA amendments] by authorizing restricted down-bidding by captains and first officers approaching 60 does not relieve it of liability for liquidated damages based on its continued discrimination against them through these unlawful restrictions" (*id.* at A34).

The court also originally held that the respondents were entitled to recover back pay against ALPA (Pet. App. A34-A35). In response to a petition for rehearing filed by ALPA which argued, inter alia, that the ADEA does not provide such a remedy against unions,[5] the court amended its opinion (*id.* at A37). Its amended opinion states (Pet. App. A38):

> Under the FLSA employees may bring actions to recover money damages against employers, *id.* § 216(b), and the term "employer" in FLSA expressly excludes labor organizations. *Id.* § 203(d). This express statutory incorporation of FLSA precludes a monetary damage or back pay award against ALPA. *Neuman* v. *Northwest Airlines, Inc.*, 28 F.E.P. Cases 1488, 1490-91 (N.D. Ill. 1982); see *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057, 1059 n.5 (S.D.N.Y. 1975).

ARGUMENT

1. The ADEA prohibits an employer from discriminating against any employee between the ages of 40 and 70

---

[5]This issue was not thoroughly discussed in the parties' appellate briefs. See Br. for Appellants Thurston *et al.* and EEOC 28-29 n. 32 (filed Jan. 14, 1983); Br. for Defendant-Appellee Air Line Pilots Association, International at 25 (filed Feb. 7, 1983); Reply Br. For Appellants Thurston *et al.* and EEOC at 18 n.17 (filed Mar. 21, 1983).

"with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age," and from limiting, segregating, or classifying its employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. 623(a)(1) and (2). The Act further forbids the involuntary retirement of any employee within this protected age group "because of the age of such individual" (29 U.S.C. (Supp. V) 623(f)(2)). The court of appeals correctly held on undisputed evidence that TWA was in direct violation of these statutory prohibitions. There is no need for further review of that decision.[6]

The policy that adversely affected TWA's captains here was age-based on its face. The company forced a captain to retire on his 60th birthday if he had not secured a flight engineer bid with an effective date prior to that date. In a tour de force of circular reasoning, TWA refused to honor a bid for a vacancy carrying an effective date beyond a

---

[6]The decision below is consistent with the only other appellate decision involving the application of the ADEA and the FAA regulation to the flight crew (*Criswell* v. *Western Air Lines, Inc.*, 709 F.2d 544 (9th Cir. 1983)). Appeals are pending in cases involving this issue in two other circuits (*Monroe* v. *United Air Lines, Inc.*, Nos. 83-1245 *et al* (7th Cir.) (jury found violation of ADEA); *Johnson* v. *American Airlines, Inc.*, No. 83-1616 (5th Cir.) (jury denied recovery).

At least five airlines have agreed to consent decrees requiring them to reinstate as flight engineers captains who were required to retire at age 60. *Worley* v. *Continental Air Lines, Inc.*, No. CV-80-1110-WMB (Kx) (C.D. Cal. consent decree entered Dec. 27, 1982); *Kiehl* v. *Pan American World Airways, Inc.*, No. C-81-4274-WAI (N.D. Cal. consent decree entered Jan. 28, 1983); *Santorelli* v. *USAir, Inc.*, No. 81-1053-A (E.D. Va., consent decree entered Mar. 16, 1982); *Richardson* v. *Alaska Airlines, Inc.*, No. C-81-974V (W.D. Wash. consent decree entered Nov. 1, 1982); *Neuman* v. *Northwest Airlines, Inc.*, No. 79 C 1570 (N.D. Ill. joint motion for entry of consent decree filed Mar. 15, 1983).

captain's 60th birthday because he was deemed to be retired at 60, and therefore stripped of the seniority that would entitle him to be awarded such a bid. These facially age-based practices, moreover, were not justified by the fact that a captain or co-pilot at age 60 is precluded from actively serving in those capacities by virtue of an FAA regulation (14 C.F.R. 121.383(c)).[7] It is undisputed that TWA uniformly permits all pilots who are disqualified from retaining their current positions for *non-age related* reasons to remain employed, to continue to accrue and exercise seniority, and thus to move, immediately or eventually, into positions for which they remain qualified. TWA proffered no reason for denying the same treatment to older pilots similarly disqualified by virtue of the FAA regulation.

The court of appeals correctly held that this "direct evidence of a differentiation based solely on age * * * established * * * a prima facie case" (Pet. App. A24). Cf. *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978) (employer's reliance on sex-segregated mortality tables that disadvantage women is a violation of Title VII because "[s]uch a practice does not pass the simple test of whether 'treatment of a person [is] in a manner which but for that person's sex would be different' "). See also *Houghton* v. *McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), cert. denied, 434 U.S. 966 (1977); *Rodriquez* v. *Taylor*, 569 F.2d 1231, 1237 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978).

Petitioner's claim (Pet. 17-21) that this holding is in conflict with the holdings of other circuits on the scope of the ADEA is based on a mischaracterization of the opinion below. The court did not hold that " 'because TWA routinely accommodates other employees . . . for *non-age*

---

[7]The validity of the FAA rule is not at issue in this case.

reasons,' it must accord the *same* treatment to age-60 captains and first officers . . .' " (*id.* at 18 (emphasis in original)). Rather, the language selectively quoted by TWA reads in full (Pet. App. A31 (emphasis added; footnote omitted)):

> because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons *and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers,* the Thurston litigants and the EEOC claimants must prevail on their ADEA claim. The sole reason for its discrimination against age-60 captains and first officers is their age; this is prohibited by the ADEA.

Thus, contrary to petitioner's claim, the decision below establishes no "new ADEA standard" under which an employer who accommodates employees for non-age related reasons "must provide the same accommodation * * * because of age" (Pet. 17-18). Rather, the court does no more than reiterate the basic principle of the ADEA, *i.e.*, that an employer may not withhold employment privileges and opportunities from older workers simply because of their age.[8]

---

[8]Petitioner's professed confusion concerning its ADEA obligations in the wake of this case (Pet. 18) is disingenuous. The employer in petitioner's first hypothetical who allocates vacation benefits on the basis of length of service does not offend the Act. Indeed, older employees are generally among the most senior in the work force, and thus tend to be favored by a system that distributes benefits on the basis of length of service. That is the chief reason Congress enacted Section 4(f)(2) of the Act, immunizing action taken to observe the terms of a bona fide seniority system. See 113 Cong. Rec. 7076 (1967) (remarks of Senator Javits). On the other hand, the employer who uses age and/or length of service as criteria for *adverse* actions opens himself to ADEA liability. See *EEOC* v. *Westinghouse Electric Corp.*, No. 83-5008 (3d Cir. Dec. 29, 1983); *EEOC* v. *City of Altoona*, No. 82-5805 (3d Cir. Dec. 13, 1983). Cf. *Geller* v. *Markham*, 635 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981) (hiring criterion of less than five years experience found to result in discrimination on the basis of age).

Under petitioner's second hypothetical, the refusal to pay sick pay to a captain disabled one day in advance of his 60th birthday, when he is disqualified from remaining in that position, would not ordinarily constitute age-based discrimination. An inference of discrimination would surely arise, however, if the employer paid such sick pay to similarly situated younger pilots, *e.g.*, the 50-year old captain who is disabled one day prior to the abolition of his job and who is unable to displace a less senior captain.

[9]Petitioner also incorrectly suggests (Pet. 20) that EEOC seeks preferential treatment for age 60 captains or first officers. What EEOC will seek on remand is "such * * * equitable relief as may be appropriate to effectuate the purposes of [the] Act" (29 U.S.C. 626(b)) which, at a minimum, must permit captains and first officers to retain their positions until age 60 and then treat them like all similarly situated employees no longer able to perform their jobs for reasons other than age — *i.e.*, permit them to transfer to flight engineer positions if they have sufficient seniority to do so, or, if not, to remain on vacation and

That holding is entirely consistent with legislative intent and prevailing case law. Contrary to petitioner's claim (Pet. 19-20), the court clearly understood that the ADEA amendments do "not require employers to provide special working conditions for older workers to allow them to remain or be employed" (H.R. Rep. 95-527, 95th Cong., 1st Sess. 12 (1977)), but instead mandate "that an employee's age be treated in a neutral fashion, neither faciliating nor hindering advancement, demotion, or discharge" *Parcinski* v. *Outlet Co.*, 673 F. 2d 34, 37 (2d Cir. 1982), cert. denied, No. 82-459 (Jan. 10, 1983). Accord: *Williams* v. *General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982); *Cova* v. *Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978). Accordingly, in rejecting petitioner's argument that a ruling in favor of respondents required preferential treatment,[9] the court stated (Pet. App. A29-A30):

Our holding does not require TWA to provide "special working conditions for older workers to allow them to remain or become employed." H.R. Rep. No. 527, *supra*, at 12; *Parcinski* v. *Outlet Co.*, *supra*, 673 F.2d at 37. Appellants do not ask for "special treatment," *Parcinski*, *supra*; rather, they merely seek the same treatment accorded all younger captains and first officers who become unable to serve in their former capacities for non-age reasons. There is nothing "special" or "preferential" about equal treatment.

2. As the court below noted (Pet. App. A33), the ADEA permits recovery of liquidated damages, in effect double the pecuniary value of the lost wages, in cases of "willful" violations (29 U.S.C. 626(b)).[10] Drawing on its previous

---

then leave without pay while accruing sufficient seniority to entitle them to a position. See pages 4-5, *supra*; CA. App. 841-842.

Equally spurious is petitioner's claim (Pet. 20) that it treated age 60 captains and co-pilots no less favorably than younger, similarly situated pilots, because many older officers were successful in complying with the company's restrictive downbidding procedure. As the court below recognized, "[t]he ADEA, like Title VII, 'does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her [protected class] * * * were hired. . . . Every individual employee is protected against . . . discriminatory treatment' " (Pet. App. A25, quoting *Connecticut* v. *Teal*, 457 U.S. 440, 455 (1982) (emphasis in original)). As the court further noted (Pet. App. A25), TWA's policy exacts a toll even from successful downbidders. These pilots are forced to bid for a vacancy substantially in advance of their 60th birthdays in order to avoid the risk that none will later be available, and to enter training and fill that vacancy as close as possible to its effective date (see note 3, *supra*). The result is that a captain perfectly capable and qualified to retain the position in which he has served the company for years is forced prematurely into the less prestigious and lower paying flight engineer job.

[10]29 U.S.C. 626(b) incorporates into the ADEA by reference the remedies provided in 29 U.S.C. 216(b) for violations of the Fair Labor Standards Act (FLSA) but specifically limits the payment of "liquidated damages" to "cases of willful violations" of the ADEA. The

dicta in *Goodman* v. *Heublein, Inc.*, 645 F.2d 127, 131 and n.6 (2d Cir. 1981), the court held that where, as here, an employer intentionally treats older workers less favorably because of their age, its ADEA violation is willful if it "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (Pet. App. A33). In holding that specific intent to violate the ADEA is unnecessary to establish willfulness (*ibid.*), the court did not, as petitioner contends (Pet. 9-11), depart from the law of any other circuit. Moreover, under the standard adopted here, liquidated damages do not "follow *a fortiori* from a finding of disparate treatment" (Pet. 10).[11]

a. Contrary to petitioner's claims (Pet. 10-11), the Seventh Circuit has not embraced a specific intent standard for willfulness, and the First Circuit has never squarely addressed the issue of when liquidated damages under the ADEA may appropriately be awarded.

The Seventh Circuit in *Syvock* v. *Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 156 (1981), held that an employer acts willfully if his "actions were knowing and voluntary and * * * he knew or reasonably should have known that

---

FLSA authorizes recovery by injured employees of "the amount of their unpaid minimum wages * * * [and] an additional equal amount as liquidated damages" (29 U.S.C. 216(b)).

[11]Petitioner also faults the court for enunciating its standard in the context of a case that is being disposed of on summary judgment (Pet. 12). Other courts of appeals have addressed the elements of a willful violation in the course of reviewing jury instructions on the issue of liquidated damages. The standard comprises a principle of law; petitioner has not suggested why the procedural context in which the issue reaches the court of appeals makes any difference. It is entirely appropriate for the court of appeals to consider the issue on review of a motion for summary judgment, when, as here, all factual issues underlying the claim for liquidated damages are undisputed (see pages 17-18, *infra*; Pet. App. A5 n.5; A13).

those actions violated the ADEA." The court expressly noted that this standard—designed to limit willful violations to "situations in which an employer consciously discriminates against an employee because of his age" as opposed to those in which discrimination arises "from an unconscious application of stereotyped notions of ability" (665 F.2d at 155)—"is consistent with the standard endorsed in dicta * * * [in] *Goodman* v. *Heublein, Inc.*"(665 F.2d at 155 n.9). It is, of course, the standard enunciated in the *Goodman* dicta that the court below adopted.

Any suggestion that the *Syvock* standard requires specific intent to violate the law was dispelled by the Seventh Circuit in its later decision in *Orzell* v. *City of Wauwautosa Fire Dep't*, 697 F.2d 743 (1983), cert. denied, No. 83-205 (Nov. 28, 1983). In *Orzel*, the city defendant required a fire department assistant chief to retire when he became 55, and maintained that the action was lawful under Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1), because it was implementing a bona fide occupational qualification for the position. The magistrate expressly found that while the city "did not proceed maliciously," it "knew *or should have known*" that the mandatory retirement violated the ADEA (697 F.2d at 758-759 (emphasis added)). The Seventh Circuit upheld the magistrate's ultimate finding of willfulness on the ground that it correctly conformed to the *Syvock* standard, even though the magistrate had relied on *Wehr* v. *Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980), using a test that expressly excludes the element of specific intent (*Orzell*, 697 F.2d at 747, 757 n.28).[12]

---

[12]Indeed, according to *Orzell*, 697 F.2d at 757 n.28, *Syvock* expressly approved the reasoning in *Wehr* as well as in *Kelly* v. *American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981)—two of three decisions which petitioner claims to be inconsistent with *Syvock* (Pet. 11). The third, *Blackwell* v. *Sun Electric Corp.*, 696 F.2d 1176 (6th Cir. 1983), held that an ADEA plaintiff is entitled to liquidated damages if he shows

The First Circuit in *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1979), did not purport to decide under what circumstances an employer's ADEA violation would be deemed willful. In *Loeb*, the jury had found the employer's violation willful, and liquidated damages had been awarded. The court of appeals rejected the employer's claim on appeal that this award was improper because there was no specific finding that it had not acted in good faith. The court noted in passing that "a finding of 'willfulness' would seem to preclude a finding of 'good faith' " (600 F.2d at 1020). At this point, the court simply quoted the definition of willfulness used in criminal cases, which includes a requirement of specific intent to do something the law forbids (*id.* at 1020, n.27).[13] The First Circuit has never decided whether the ADEA standard of willfulness might be met by a showing that the employer either knew or should have known of the statutory requirement, or acted with reckless disregard of those requirements. To the extent that the *Loeb* dictum indicates that such a showing might be insufficient, we

---

that the "employer's actions were voluntary and intentional, because of age" and that the employer "was reckless in not knowing that his actions were governed by the ADEA or that the employer acted in reckless disregard of whether his actions were covered by the ADEA" (696 F.2d at 1184). In so holding, the Sixth Circuit expressly noted that it agreed with *Syvock* (*ibid.* n.12).

[13]The quotation was taken from E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.06, at 384 (3d ed. 1977), discussing mens rea in the criminal context. Liquidated damages are not punitive, however; they instead compensate for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages." H.R. Rep. 95-950, 95th Cong., 2d Sess. 14 (1978) (quoting *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 583-584 (1942)). While willful in the criminal context generally means an act done with bad purpose, it is employed in the civil context to characterize an act that is "intentional, or knowing, or voluntary, as distinguished from accidental" (*United States* v. *Murdock*, 290 U.S. 389, 394 (1933)) or "conduct marked by careless disregard whether or not one has the right to so act." *United States* v. *Illinois Cent. R.R.*, 303 U.S. 239, 243 (1938).

suggest that the First Circuit might well today reconsider that dictum in light of the rejection by all other courts of appeals that have subsequently considered the issue of a specific intent standard for awarding liquidated damages under the ADEA. *Wehr* v. *Burroughs Corp.*, 619 F.2d at 283; *Spagnuola* v. *Whirlpool Corp.* 641 F.2d 1109, 1113-1114 (4th Cir.), cert. denied, 454 U.S. 860 (1981); *Blackwell* v. *Sun Electric Corp.*, 696 F.2d 1176,1184 (6th Cir. 1983); *Kelly* v. *American Standard, Inc.*, 640 F.2d at 979-980.[14] We submit, therefore, that there is no present inter-circuit controversy over the showing necessary to support an award of liquidated damages under the ADEA.[15]

b. Petitioner argues that, under the willfulness standard adopted by the court of appeals, liquidated damages "follow *a fortiori* from a finding of disparate treatment"

---

[14]Section 6(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. 255(a), establishing a three-year statute of limitations for "willful" violations of the FLSA, is incorporated into the ADEA by 29 U.S.C. (Supp. V) 626(e)(1). As in cases involving liquidated damages under the ADEA, the courts have consistently held that specific intent to violate the law is not required to establish a willful violation for purposes of this statute of limitations provision. *Brennan* v. *Heard*, 491 F.2d 1, 3 (5th Cir. 1974); *EEOC* v. *Central Kansas Medical Center*, 705 F.2d 1270, 1274 (10th Cir. 1983); *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 461-462 (D.C. Cir. 1976).

[15]As petitioner notes (Pet. 11-12 n.*), *Koyen* v. *Consolidated Edison Co.*, 560 F.Supp. 1161, 1165 (S.D.N.Y. 1983), stated that a defendant must act "with knowledge of the illegality of his action" in order to be subject to liquidated damages under the ADEA. But that case also expressly approved the award of liquidated damages upon a showing that "the defendant deliberately, intentionally, and knowingly discharged plaintiff because of his age, and * * * knew or *should have known* such conduct was unlawful." 560 F. Supp. at 1166 (emphasis added). See *Whittlesey* v. *Union Carbide Corp.*, 567 F.Supp. 1320, 1330 (S.D.N.Y. 1983) (reading *Koyen* as requiring, for liquidated damages, a showing that the employer acted with knowledge of the illegality of his action or "at least an inexcusable disregard," and agreeing with that requirement).

(Pet. 10). This is incorrect; the standard has two elements. It is not enough that the employer's discriminatory acts are knowing and voluntary, *i.e.*, not "the result of negligence, mistake, or other innocent reason" (Pet. App. A33-A34)—a requirement that will be satisfied in a disparate treatment case, where the employer intentionally discriminates on the basis of age. The court also requires a further showing, that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (Pet. App. A33). Disparate treatment, standing alone, does not render the employer liable for liquidated damages.

Nor did the court hold that that TWA's violation was willful because it was "merely aware of the existence of the statute" (Pet. 10). It is, of course, undisputed that TWA knew of the ADEA's requirements: the policy under attack here was promulgated after review of the 1978 amendments to the Act. Moreover, it is also undisputed that the company, through Vice President Crombie, initially decided in view of those amendments that it was required to reinstate and continue to employ age 60 captains as flight engineers, regardless of the existence of flight engineer vacancies (pages 2-3, *supra*). It is further undisputed that that decision was disavowed by TWA Vice President Frankum, that Frankum opposed the employment of any flight crew member beyond age 60, and that the company's ultimate policy of retiring and refusing transfers to age 60 captains and first officers was issued at his direction (*ibid.*). Clearly, petitioner's facially discriminatory policy did not arise from an unconscious application of stereotyped assumptions about the ability of these age 60 pilots to perform in the flight engineer positions they sought. See *Syvock* v. *Milwaukee Boiler Mfg. Co.*, 665 F.2d at 155-156 and n.10. TWA entertained no such assumptions because it allowed flight engineers to continue to work beyond 60 and, indeed,

contested ALPA's claim that an age limit of 60 was a legitimate qualification for the flight engineer position (note 2, *supra*). The court below properly concluded that petitioner's restrictive transfer policy, which catapulted into retirement those captains and first officers who failed to comply with it, was nothing more than "an attempt to escape full compliance" with the 1978 ADEA amendments (Pet. App. A34), an attempt which, consciously undertaken, rendered the company liable for liquidated damages.

3. The court correctly determined (Pet. App. A31-A33) that ALPA violated Section 4(c)(3) of the ADEA, 29 U.S.C. 623(c)(3), which makes it unlawful for a labor organization "to cause or to attempt to cause an employer to discriminate." In its amended opinion, however, the court held that the statute immunizes unions from monetary liability for their discriminatory acts (Pet. App. A37-A39).

Like petitioner (Pet. 13-17), the EEOC took the position below that a labor organization that has violated the ADEA should be held liable for back pay and other relief on the same terms as an employer. As petitioner points out, however, the court below is the first court of appeals that has addressed this issue. Since the enactment of the statute in 1967, the question has been presented in only two other instances, both involving the union in this case: *EEOC* v. *ALPA*, 489 F. Supp. 1003, 1009 (D. Minn. 1980), rev'd on other grounds, 661 F.2d 90 (8th Cir. 1981) (union held liable for back pay award); *Neuman* v. *Northwest Airlines*, 28 Fair Empl. Prac. Cas. (BNA) 1488, 1491 (N.D. Ill. 1982) (union held not liable for monetary damages). In view of the embryonic state of the law and the absence of a split in the circuits, we submit that there is as yet no need for review by this Court of this issue.

In any event, the proper parties to seek further review of this issue would be respondents, the ones who were injured by ALPA's discriminatory conduct.[16] In the posture of this case, TWA's petition is analogous to a claim for contribution by one violator of federal law against another. That claim should be rejected. Cf. *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 91-95 (1981) (employer has no express or implied right of action for contribution from a union under the Equal Pay Act, which was not enacted for employers' special benefit).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

DAVID L. SLATE
General Counsel
Equal Employment Opportunity Commission

JANUARY 1984

---

[16]The Commission has not done so in light of the absence of a conflict in the circuits, the fact that the court's cursory analysis adds little to the law on this subject, and the fact that the pilots on whose behalf EEOC intervened will obtain full relief from TWA because ADEA defendants are jointly and severally liable for violating the Act. See *Secretary of Labor* v. *Crown Central Petroleum Corp.*, 90 F.R.D. 99, 101-102 (E.D. N.Y. 1981) (FLSA); *Dunlop* v. *Beloit College*, 411 F. Supp. 398, 402 (W.D. Wis. 1976) (Equal Pay Act). See also 3A *Moore's Federal Practice* para. 19.07 [1] at 19-111, para. 19.11 at 19-233 to 19-234 (2d rev. ed. 1982); W. Prosser, *Law of Torts* 296-297 (4th ed. 1971).

DOJ-1984-01